

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)

Description of case

Date of decision: 10.07.2006

Civil Misc. Writ Petition No. 516 (M/B) of 2006

M/s Radico Khaitan Ltd.
having its Registered Office at
Bareilly Road, Rampur Petitioner

Versus

1. State of Uttaranchal
through its Secretary, Excise
Dehradun.
2. Excise Inspector
Officer Incharge of Radico Khaitan Ltd
A-2, Bazpur Industrial Area
Sultanpur Patti
District Udham Singh Nagar
3. District Excise Officer
Udham Singh Nagar. Respondents

ALONGWITH

Civil Misc. Writ Petition No. 620 (M/B) of 2006

M/s Radico Khaitan Ltd.
having its Registered Office at
Bareilly Road, Rampur Petitioner

Versus

1. State of Uttaranchal
through its Secretary, Excise
Dehradun.
2. Excise Commissioner
Uttaranchal, Dehradun. Respondents

Mr. Dinesh Dwivedi, Senior Counsel with Mr. Ashish Mohan and Mr. Sudhir Kumar,
Advocate for the petitioner.
Mr. J.P. Joshi, Addl. Chief Standing Counsel for the respondents.

A.F.R. (Approved for Reporting)
Not approved for Reporting

(Initials of Judge)

Date: 10.07.2006

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2. Excise Commissioner
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Mr. Dinesh Dwivedi, Senior Counsel with Mr. Ashish Mohan and
Mr. Sudhir Kumar, Advocates for the petitioner.
Mr. J.P. Joshi, Addl. Chief Standing Counsel for the respondents.

Coram: Hon'ble Rajeev Gupta, C.J.,
Hon'ble Prafulla C. Pant, J.

Both these writ petitions, filed by the same petitioner, are connected with each other and are being disposed of by this judgment. In writ petition No. 516 of 2006 (M/B), the petitioner has sought writ in the nature of certiorari, quashing the letter-dated 12.04.2006, issued by respondent No. 2 and letter dated 24.04.2006, issued by respondent No. 3, whereby the petitioner, who is the manufacturer of liquor, has been asked to pay bottling fee at the enhanced rate. By means of writ petition No. 620 (M/B) of 2006, the petitioner has challenged vires of two notifications dated 10.05.2006 (Annexure- 12 and 13 to the writ petition), whereby the respondent No. 1 has amended the U.P. Bottling of Foreign Liquor Rules, 1969 (hereinafter referred as Bottling Rules) and U.P. Establishment of Manufactory Rules, 1997 (herein after referred as Manufactory Rules), as applicable in Uttaranchal.

2. We heard learned counsel for the parties.

3. Brief facts, as narrated in the writ petition, are that Petitioner Company is engaged in the manufacture of potable, industrial alcohol, denatured spirit etc. having its registered office at Bareilly Road, Rampur. The

petitioner company has set up various bottling units in various states for manufacture of Indian made foreign liquor brands. One of such unit was set up in the year 2004-05 in Sultanpur Patti, Bazpur, District Udham Singh Nagar (Uttaranchal). Bottling Rules and Manufactory Rules, as existed on the date of creation of State of Uttaranchal, are applicable to the new State subject to the modifications made by the successor state. The petitioner obtained the license under the aforesaid rules from the concerned authorities in the new State. Copies of licenses FL3 under Bottling Rules and FLM 3 under Manufactory Rules, for the aforesaid year, are annexed as Annexure 3 and 4 to the writ petitions.

4. State of Uttaranchal notified its excise policy for the financial year 2006-07, vide notification-dated 06.03.2006, which is annexed as Annexure-5 to the writ petitions. By said policy, the State Government enhanced the license fee and the rate of bottling fee for the license holders in the form of FL 3-A, equaling the same payable by holders of license FLM 3. In pursuance to said policy, vide impugned letter dated 12.04.2006, the Excise Officer asked the petitioner to deposit the bottling fee at the rate applicable to holders of licenses of FL 3-A against which the petitioner made a representation to the concerned authorities. According to the petitioner, he is not liable to pay the enhanced bottling fee and the enhancement is illegal and arbitrary.

5. While the writ petition No. 516(M/B) of 2006 was pending, the respondent No. 1 amended the Bottling Rules and the Manufactory Rules, vide two notifications dated 10.05.2006, as contained in Annexure 12 and 13 to the writ petition No. 620 of 2006 (M/B). In the subsequent writ petition i.e. 620 of 2006 (M/B), vide Annexure 12, Rule 2 (1) (a) and Rule 2 (2) of Bottling Rules were amended. It is provided that apart from distiller, brewer and vintner, bottling license may be granted to holders of license FLM 3 to bottle spirits, in form FL 3B. It is further provided in the amended rules that holders of FL3 B would be required to pay same rate of bottling fee, as payable at the enhanced rate by FL3-A. By amendment in Manufactory Rules, Rule 3 (6) and Rule 8 of the Manufactory Rules were amended. In Rule 8, now it is provided that manufactory shall be granted license FL 3B instead of FL3 to bottle the manufactured Indian made foreign liquor and the licensee shall be liable to pay bottling fee as under:-

- i) Bottles of 750 ml - Rs. 4.50 per bottle.
- ii) Bottles of 375 ml - Rs. 2.25 per bottle.
- iii) Bottles of 180 ml - Rs. 1.15 per bottle.

6. The above amended rules have been challenged by the petitioner in subsequent writ petition No. 620 of 2006 on the various grounds including the grounds mentioned here under:-

- (1) Impugned amendments are introduced in mid of the Excise year 2006-2007 after the bottling license granted to the petitioner had already been issued for the current year.
- (2) Impugned amendments made vide notifications dated 10.05.2006, are malafide as issuance thereof is to defeat the relief prayed by the petitioner in writ petition No. 516 of 2006.
- (3) Impugned amendments in the Rules are in violation of the declared Excise Policy of the government, notified vide notification dated 06.03.2006. (Annexure 5 to writ petition No. 516 of 2006 (M/B)).
- (4) Impugned amendments are discriminatory, unreasonable, arbitrary and violative of Article 14 of Constitution of India, as such ultra vires. The enhancement in bottling fee is six times high as compared to old rates without any sufficient reason and the Government cannot do it as it violates the principle of quid pro quo.
- (5) The unreasonable enhancement in bottling fee puts unreasonable restriction on the rights of the petitioner company to carry on trade in competition with other companies involved in liquor trade.
- (6) The amendments made in Manufactory Rules and Bottling Rules are without any authority on the part of the Government.

7. The respondents in their counter affidavits, admitted that the license FLM 3 to work as a Manufactory, was granted to the petitioner on 23.03.2005 by the Government under Manufactory Rules. The subsequent license FL-3, for the bottling in the manufactory was also issued to the petitioner on 24.03.2005 under Bottling Rules. The petitioner consequently carried out his bottling process under FL 3 license from 01.04.2005 to 31.03.2006. It is also not disputed that for the current financial year i.e. 2006-07, the petitioner deposited requisite license fee of Rs. 25,09,444/- for renewal of its license FLM 3. In the circumstances, the Collector has allowed the petitioner to carry on the business. It is also admitted by the respondents that the petitioner has deposited requisite amount for carrying out the bottling operation under FL 3 license at the enhanced rates of bottling fee for the year 2006-07. According to the respondents, as on today, the petitioner is having licenses FLM3/FL3. It is stated in the counter affidavit that the petitioner has the monopoly of bottling plant in the State. As such, he is saving the cost of transport and other taxations on finished goods, for he is only importing the Extra Neutral Alcohol (E.N.A.), a tax-free raw material. It is also stated in the counter affidavit that not satisfied with the benefits, already drawing, the petitioner wants to evade the difference of the bottling fee payable by FLM 3 license holder with the one payable by distillery. He cannot equate himself with the distillery which has to make a huge investment in the State in its commercial

activities with elaborate infrastructure. The petitioner's small bottling plant is producing the foreign liquor from Extra Neutral Alcohol (E.N.A) mixing with water, as against the finished product of liquor manufactured and bottled outside the state for the consumption in Uttaranchal. During the year 2005-06, the petitioner bottled nearly 50 lakhs bottles and paid license fee Rs. 25,09,444/- + bottling fee @ 0.75 per bottle Rs. 37,50,000/- + import duty of E.N.A. Rs. 17,07,447 = Rs. 79,66,891/-. Had the petitioner held BWFL-2 (Bond License) instead of FLM 3 in the year 2005-06, he would have deposited the import fee @ Rs. 5 per bottle accruing the total revenue of Rs. 2,50,00,000/-. Thus difference (shortfall) in revenue by granting FLM 3 comes out to be Rs. 2,50,00,000- Rs. 79,66,891 = Rs. 1,70,33,109/-. That is why to reduce this apparent loss in revenue, the State Government has amended the rate of bottling fee under FL 3 licenses (renamed under amended rules as FL 3B), required to be held by FLM 3 licensee for the year 2006-07. It is stated in the counter affidavit that the State Government has power to make and amend the rules under Section 40 of U.P. Excise Act, 1910 (adapted and modified in Uttaranchal in 2002). In order to curb the monopolistic trend in the liquor trade in Uttaranchal, and to safeguard the revenue on account of import fee, the bottling rates have been amended by the State. Now, the petitioner has FLM 3 license, which is under consideration for renewal, and will have to pay bottling fee at the enhanced rate under bottling license FL 3-B, created

under amended U.P. Bottling Rules, 1969. It is admitted in the counter affidavit that FL 3 (bottling license) of the petitioner has been renewed by the District Excise Officer on 30.03.2006, as per the declared Excise Policy of the state, on the condition of payment of enhanced rate of bottling fee. The impugned notification, which pertains to tax structure fee for the year 2006-07 had prescribed the new rate of bottling fee for FL 3 license held by FIM3 licensee. And there is nothing illegal in the same. Lastly, it is stated in the counter affidavit that the petitioner himself has submitted affidavit dated 25.02.2006 (copy Annexure-C.A. 5 to the counter affidavit) in which he has undertaken that he would deposit the required amount of enhanced fee for consideration of his application for renewal of bottling license.

8. Shri Dinesh Dwivedi, learned counsel for the petitioner, challenging the validity of impugned amended Rules (Annexure- 12 and 13 to the writ petition No. 620 of 2006), notified on 10.05.2006, argued that State Government has no power to enhance the bottling fee in the mid session of the excise year to the disadvantage of the licensee. He further argued that this amounts to amend the Rules retrospectively. On behalf of the petitioners, our attention is drawn to the principle of law laid down in ***Cannanore Spinning and Weaving Mills Ltd Vs. The Collector of Customs and Central Excise AIR 1970 Supreme Court 1950*** in which with regard to the rules framed under Central

Excise and Salt Act, 1944, it is held by the Apex Court that the rule making authority is not vested with the power to make rules with retrospective effect. We have gone through said case law. We are of the view that the rules framed under U.P. Excise Act, 1910, are since governed by its Section 40 and Section 77, the power of State Government to make Rules with retrospective effect are required to be seen in the light of provisions of said Act. Section 40 of U.P. Excise Act, 1910, empowers the State Government to make rules, and Section 77 of said Act, provides that the rules framed by the State Government shall have effect from the date of publication of the rules or from such date, as may be specified in that behalf. The Apex Court while interpreting the analogous provision of Madhya Pradesh Act, 1915, in ***State of Madhya Pradesh Vs. Tikamdas AIR 1975 Supreme Court 1429***, has held that the amendment made in the rules made by State Government retrospectively cannot be said to be ultra vires. The Supreme Court has held that incorporating the expression “ All rules made and notifications issued under this Act shall be published in the official gazette and shall have effect from the date of such publication or from such other date, as may be specified in that behalf”, indicates that the legislature has imposed its delegate, the State Government not merely to make the rules but to give effect to them from such date as may be specified by the delegate. In this connection, the Supreme Court has further held in the case of State of Madhya Pradesh Vs. Tikamdas (Supra) that the above

expression in Madhya Pradesh Excise Act, 1915, not only empowers the State Government to make the rules but also to bring them into force from any previous date. It is further held that ante dating the effect of amendment is not obnoxious to the scheme, nor ultra vires. Provision in Section 77 of U.P. Excise Act, 1910, are analogous to those contained in Section 62 of Madhya Pradesh Excise Act, 1915. In the circumstances, the impugned amended rules notified on 10.05.2006, by the State of Uttaranchal with regard to which it has been mentioned that the same shall be deemed to have come into force from 1st April, 2006, cannot be said to be ultra vires in view of Section 40 read with Section 77 of U. P. Excise Act, 1910.

9. The contention advanced on behalf of the petitioner before this Court is that the counter affidavit filed by the respondents itself shows that the bottling fee has been enhanced merely for the reason that had the petitioner been required to import the liquor, he would have paid bottling fee at the rate of Rs. 5 per bottle. And as such, to reduce the loss to the revenue, the bottling fee has been enhanced to Rs. 4.50 per bottle for holder of FLM 3 who is also now required to have bottling license FL3 B under the new Rules. It is further contended on behalf of the petitioner that this kind of reasoning to enhance the bottling fee has no rationale nor is based on any reasonable classification. In this connection, it is further contended that incomparables cannot be equated as it would result in

violation of Article 14 of Constitution of India. Our attention is drawn on behalf of the petitioner to the principle of law laid down in ***Bennett Coleman and Co. Ltd Vs. Union of India AIR 1973 Supreme Court 106*** and it is argue that unequals cannot be equated by the Government in making the law. On examination of said case, we see no similarity of the facts with the present case. In our opinion the object sought to be achieved by the State Government in bringing the impugned amendments in the Bottling Rules and Manufactory Rules, is to make up the loss in the revenue receipts. Admittedly, the petitioner has a distillery in Rampur in the State of Uttar Pradesh. And before financial year 2004-05 under BWFL (Bond License) it was required to pay bottling fee at the rate of Rs. 5 per bottle in importing the same in the State of Uttaranchal. However, after the petitioner set up its manufactory unit in State of Uttaranchal, maintaining its distillery at Rampur, the State has suffered loss of revenue, as for the year 2005-06, it paid only Rs. 0.75 per bottle under the license FL3 like those units who had their distillery in State of Uttaranchal. In these circumstances, the State made the impugned amendments to make it necessary to obtain FL2-B license under Bottling Rules for the licensee of FLM 3. That being so, it cannot be said that the unequals are being treated as equals by the State Government. The lower rate of bottling fee is applicable to those who are having their distillery in the State of Uttaranchal and the petitioner does not fall in that category. As such, in

our opinion, there is no unreasonable classification nor is there any discrimination against the petitioner, violative of Article 14 of Constitution of India. Those manufacturers who are having distillery in the State of Uttaranchal are contributing to the revenue and development of the state in a bigger way, as compared to those who are having only manufactory unit with their distillery unit out of the State. As such, the State has made no unreasonable classification in making the impugned amendments in the rules.

10. From the foregoing discussion, it emerges out that:

- i. Section 40 of the U.P. Excise Act, 1910 confers power on the State Government to make rules for carrying out the objects of the Act;
- ii. By virtue of Section 77 of the Act and in view of the dictum of the Apex Court in the case of State of Madhya Pradesh Vs. Tikkam Das (AIR 1975 SC 1429), the State Government can specify that the Rules shall have retrospective effect;
- iii. The State Government is empowered to regulate the manufacturing, bottling and trading of liquor by imposing conditions including imposition and enhancement of license fee, bottling fee etc.;

iv. Enhancement of the bottling fee, by the State Government by amending the Rules, cannot be termed as 'unreasonable' in any manner.

In view of the above conclusions, the impugned amendments in the Bottling Rules and Manufacturing Rules notified on 10.05.2006 are constitutionally valid and therefore, cannot be declared ultra vires.

11. Accordingly, the writ petition No. 620 of 2006 is liable to be dismissed. Consequently, the writ petition No. 516 of 2006 is also liable to be dismissed. And the relief sought in said writ petition too cannot be allowed in view of the amendments in the rules. Therefore, both the writ petitions No. 516 of 2006 and 620 of 2006, are dismissed. No order as to costs.

(Prafulla C. Pant, J.)

(Rajeev Gupta, C.J.)

Dt: 10.07.2006

Sweta